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FIRST AMENDMENT—PRISONER RIGHTS AND IMMUNITY FOR PRISON OFFICIALS

Procunier v. Navarette, 434 U.S. 555 (1978)

In *Procunier v. Navarette*,[1] the Supreme Court held that prison officials, charged with negligently interfering with a prison inmate's mail,[2] had a qualified immunity from suits brought under 42 U.S.C. § 1983.[3] The Court stated that, in determining whether a state official had acted in good-faith to retain his qualified immunity,[4] the threshold question would be whether the constitutional right alleged to have been violated was "clearly established." The Court, concluding that "there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners"[5] at the time the alleged conduct occurred, held that the defendants acted in good faith and so retained a qualified immunity.[6]

I

Respondent, Apolinar Navarette was an inmate at Soledad prison in California at the time he instituted suit against the prison officials in question. During his prison term, Navarette had been prison law librarian, had participated in a law-student visitation program and had prepared writs and pleadings on behalf of himself and other inmates. Navarette alleged that from September 1, 1971 to December 11, 1972, prison officials violated his first amendment right to correspond by confiscating and interfering with his mail.[7] He further alleged that the officials, in an effort to hamper his legal activities, violated his right of access to the courts by removing him as law librarian and by terminating a law student visitation program.[8] These violations were alleged to have been committed either knowingly or negligently. Navarette sued for damages under 42 U.S.C. §§ 1983 and 1985.[9]

The district court granted summary judgment for the defendants as to the first three claims, and dismissed the fourth through ninth claims for failure to state a federal claim. On appeal, the Ninth Circuit reversed as to claims one through six.[10] As to claims one and two, concerning the alleged deprivation of Navarette's right to correspond, the court of appeals first held that the interference with Navarette's mail violated his first amendment rights. In support of this decision, the court cited

[1] 434 U.S. 555 (1978).

[2] The officials charged included the Director of the State Department of Corrections, the Warden and Assistant Warden of Soledad, a member of the prison staff in charge of handling incoming and outgoing prisoner mail, and four unnamed defendants. The letters alleged to have been interfered with were to legal assistance groups, law students, the news media and inmates in other state prisons, as well as personal friends.

[3] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] The Court has described the difference between an absolute immunity and a qualified immunity in procedural terms. Procedurally, an absolute immunity "defeats a suit at the outset" so long as the act sued upon was done within the sphere of the official's duties. Imbler v. Pachtman, 424 U.S. 409, 419 n.3 (1976); Pierson v. Ray, 386 U.S. 547, 554 (1967); Tenney v. Brandhove, 341 U.S. 367, 376, 378 (1951). Whether an official is accorded a qualified immunity from suit "depends upon the circumstances and motivations of his actions as established by the evidence at trial." *Imbler*, 424 U.S. at 419 n.3. These "circumstances and motivations," the basis of a good faith immunity, will be discussed in section II *infra*.

[5] 434 U.S. at 563-64.

[6] *Id.*

[7] Navarette v. Enomoto, 536 F.2d 277, 279 (9th Cir. 1976).

[8] Specifically, *Navarette* set out nine complaints. Claims one and two alleged that prison officials deliberately refused to mail certain letters, or to send others by registered mail, all in violation of the federal constitution and the prison's mail regulations then in effect. Claims four and five alleged that his removal as prison librarian was designed to punish him for, or hamper him in, his legal activities, thus depriving him of his right of access to the courts. Claims three and six alleged that these acts were committed negligently. Claims seven through nine, "realleged the substance of claims 1 through 6 and sought to hold the supervisory officials liable upon a theory of vicarious rather than personal liability." 434 U.S. at 559 n.4.

[9] 42 U.S.C. § 1985 (1970) details certain conspiracies interfering with civil rights.

[10] Navarette v. Enomoto, 536 F.2d 277, 279 (9th Cir. 1976). The court of appeals agreed with the district court that claims seven through nine failed to state a federal claim.

two Ninth Circuit cases that had indicated that prisoners retained their rights to free expression while in jail.[11] The court also relied on *Martinez v. Procunier*,[12] which had held that the regulations then governing censorship of prisoner mail in California violated prisoners' first amendment rights to correspond.[13]

The court of appeals determined that prison officials had a qualified immunity from suits for damages brought under section 1983, but held that as Navarette's allegations contradicted the officials' claims of good faith, it was necessary to consider issues of fact. This holding precluded summary judgment.[14] The court then reversed as to claims four and five, holding that the removal of Navarette as prison librarian and the termination of the law student visitation program, because of his legal activities, violated Navarette's right of access to the courts.[15]

Finally, the court of appeals held that a claim of "negligent misapplication" of the prison mail regulations by subordinate officials, and the negligent training of those subordinates by supervising officials, resulting in the violation of Navarette's constitutional rights, stated a cause of action under section 1983.[16] The court cited *Monroe v. Pape*,[17] for the proposition that section 1983 "should be read against a background of tort liability that makes a man responsible for the natural consequences of his actions."[18] Thus, the court of appeals declared that a deprivation of "fundamental and reasonably well-defined" rights "need not be purposeful to be actionable under section 1983."[19]

The only question on which the Supreme Court granted certiorari was "[w]hether [a] negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?"[20] Two subsidiary issues deemed essential to the Court's analysis were "whether at the time of the occurrence of the relevant events the Federal Constitution had been construed to protect Navarette's mailing privileges and whether petitioners knew or should have known that their alleged conduct violated Navarette's constitutional rights."[21]

Justice White, writing for the Court,[22] agreed with the court of appeals that state prison officials possess a qualified immunity from liability in a section 1983 suit for damages.[23] He noted that Congress, in enacting section 1983, did not intend a "wholesale revocation of the common law immunity afforded government officials."[24] However, unlike earlier Supreme Court cases[25] where the Court had accorded a qualified immunity, the Court here refused to support the extension of this immunity to prison officials either by specifically inquiring whether a similar immunity had been accorded these officials under common law, or citing public policy demanding that such an immunity be granted. Rather, the Court simply provided a footnote stating that the courts of appeals have "generally accorded prison and jail administrators performing discretionary functions a qualified immunity from monetary liability under § 1983."[26]

The Court next turned to the standards set out

[11] McKinney v. De Bord, 507 F.2d 501 (9th Cir. 1974); Seattle Tacoma Newspaper Guild Local # 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973).

[12] 354 F. Supp. 1092 (N.D. Cal. 1973).

[13] However, as the Court in *Navarette* pointed out, the Supreme Court in Procunier v. Martinez, 416 U.S. 396 (1974) affirmed the decision in that case on the narrower ground that the prison regulations violated the constitutional rights of those addressees and senders outside of prison, rather than the prisoners' themselves. 434 U.S. at 563.

[14] 536 F.2d at 280.

[15] *Id.*

[16] *Id.*

[17] 365 U.S. 167 (1961).

[18] 536 F.2d at 287 (quoting Monroe v. Pape, 365 U.S. 167, 180 (1961)).

[19] 536 F.2d at 281–82.

[20] 434 U.S. at 559 n.6. The Supreme Court did not grant certiorari on the question of whether Navarette's removal as prison law librarian and the termination of the law student visitation program violated his right of access to the courts. The Court also refused to grant certiorari on the question of "[w]hether deliberate refusal to mail certain of a prisoner's correspondence in 1971-1972 prior to Procunier v. Martinez, 416 U.S. 396 (1974), and refusal to send certain correspondence by registered mail states a cause of action for violation of his First Amendment right to free expression?" *Id.* at 559 n.6 (quoting the petition for certiorari).

[21] 434 U.S. at 560 n.6.

[22] The majority included Justices Brennan, Stewart, Marshall, Blackmun, Powell and Rehnquist.

[23] 434 U.S. at 561.

[24] *Id.* As the immunity question stood prior to *Navarette*: legislators (Tenney v. Brandhove, 341 U.S. 367 (1951)); judges (Pierson v. Ray, 386 U.S. 547 (1967)); and prosecutors (Imbler v. Pachtman, 424 U.S. 409 (1976)) were accorded an absolute immunity from suits brought under section 1983. Policemen (Pierson v. Ray, 386 U.S. 547 (1967)); governors and their principal subordinates (Scheuer v. Rhodes, 416 U.S. 232 (1974)); school board members (Wood v. Strickland, 420 U.S. 308 (1975)) and mental hospital superintendents (O'Connor v. Donaldson, 422 U.S. 563 (1975)) have been accorded a qualified immunity.

[25] *See* Wood v. Strickland, 420 U.S. 308 (1975), Scheuer v. Rhodes, 416 U.S. 232 (1974), and Pierson v. Ray, 386 U.S. 547 (1967).

[26] 434 U.S. at 561 n.7.

in *Scheuer v. Rhodes*[27] and *Wood v. Strickland*,[28] stipulating how state officials may retain that immunity. The Court first noted that under the standard in *Scheuer*, the qualified immunity could vary according to the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action."[29] The Court then appeared to determine that the scope of immunity to be accorded these prison officials was similar to that accorded school board members in *Wood*. In so doing, the Court appears to have reasoned that prison officials, like school board members, required a degree of immunity such that they would not be deterred from exercising their discretion with independence and decisiveness, when acting in good faith.[30]

Thus the Court, applying the *Wood* standard, held that a prison official could not be considered to have acted in good faith, and would therefore lose his immunity if: a) the constitutional right alleged to have been violated was clearly established and the official knew or should have known of that constitutional right or the official knew or should have known that his conduct violated the constitutional rights of the plaintiff; or, b) the official acted with malicious intention to cause a deprivation of constitutional rights or other injury to the plaintiff.[31]

The threshold question in applying this standard was whether the constitutional right alleged to have been violated was "clearly established."[32] The Court held that, in the instant case, it was not. The Court noted that those cases cited by the court of appeals in support of its assertion that Navarette did have a first amendment right to correspond, were decided *after* the alleged constitutional violation occurred.[33] The Court also noted that while the Supreme Court did affirm the Ninth Circuit's finding in *Martinez v. Procunier*,[34] it did so holding that the prison mail regulations violated the first amendment rights of those addressees and senders *outside* of prison, and *not* the prisoners themselves.[35] The Court also dealt with those cases decided before the alleged constitutional violations which arguably supported Navarette's position. A sharp line was drawn between the decisions in those cases and the Court's desire to see an unequivocal decision on the matter before finding the right "clearly established."[36]

Holding that the first amendment right to correspond was not "clearly established" either in the Supreme Court, court of appeals, or district court, the *Navarette* Court foreclosed any discussion of whether the officials knew or should have known that their act violated a constitutional right of the plaintiff.[37] Hence, the Court went directly to the merits of the officials' affirmative defense, and held that the prison officials had acted in good faith, such that they retained their qualified immunity.[38]

The Court then turned to the second part of the

[27] 416 U.S. 232 (1974). In *Scheuer*, a case arising out of the deaths of four students shot by members of the Ohio National Guard during student protests on the Kent State campus, the Court held that the Governor and his principal subordinates were to be accorded a qualified immunity from suits brought under § 1983. This will be discussed more fully in section II *infra*.

[28] 420 U.S. 308 (1975). In *Wood*, the Court accorded a qualified immunity to school board members who were being sued by students under § 1983 for depriving those students of due process of law.

[29] 434 U.S. at 561–62 (quoting *Scheuer*, 416 U.S. at 247).

[30] 434 U.S. at 562 (citing *Wood*, 420 U.S. at 321).

[31] 434 U.S. at 562 (citing *Wood*, 420 U.S. at 322).

[32] 434 U.S. at 562. The Court, therefore, directly refuted the standard set up by the court of appeals which asked whether the constitutional right alleged to have been violated was "fundamental and reasonably well defined." 536 F.2d at 282.

[33] 434 U.S. at 563.

[34] 354 F. Supp. 1092 (N.D. Cal. 1973).

[35] Procunier v. Martinez, 416 U.S. 396 (1974).

[36] In Hyland v. Procunier, 311 F. Supp. 749 (N.D. Cal. 1970), the district court held that the state could not prohibit a parolee from speaking at a lawful public assembly because of the expected content of his speech. *Id.* at 751. In Brenneman v. Madigan, 343 F. Supp. 128, 131 (N.D. Cal. 1972), the court, quoting Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1944), stated that "a prisoner retains all the rights after ordinary citizens except those expressly or by necessary implications, taken from him by law." Therefore, the court in *Brenneman* concluded that pre-trial detainees had a first amendment right "to communicate with friends, relatives, attorneys and public officials by means of visits, correspondence and telephone calls." 343 F. Supp. at 141. The Supreme Court was quick to point out that *Brenneman* limited its holding to the facts before it: that of pre-trial detainees, who, according to the *Brenneman* court, "do not stand on the same footing as convicted inmates." *Id.* at 142. Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971), held that prisoners had a first amendment right to receive periodicals and newspapers. The Court saw this first amendment right as distinct from the first amendment right to correspond.

[37] 434 U.S. at 565.

[38] *Id.* It is interesting to note that Navarette never alleged that the interference with his mail was violative of his right of access to the courts even though many of his letters were to lawyers, law students and the media. The court of appeals expressed no opinion as to whether such interference would constitute a violation of his right of access to the courts. 536 F.2d at 279 n.1. The Supreme Court also refused to address this issue, noting that

Wood standard to determine if the prison officials had acted with malice.[39] Justice White quickly dispensed with this part of the test by holding that the Court only granted certiorari on the issue of negligence. The question of malicious intent was therefore left unresolved.

After granting the prison officials a qualified immunity and holding that these officials had retained that immunity, the *Navarette* Court finally addressed the issue on which it granted certiorari: whether negligence states a cause of action under section 1983. Justice White, however, avoided answering the question. In a footnote, he explained that because the case was disposed of on immunity grounds, the issue of whether a negligent deprivation of a constitutional right states a cause of action under section 1983 did not have to be addressed.[40]

Dissenting, Chief Justice Burger recognized that the majority had considered the wrong issue. According to Burger, the question considered should have been "whether a negligent failure to mail certain of a prisoner's outgoing letters stated a cause of action under section 1983"; the question on which certiorari was granted. He interpreted the majority's decision as, instead, addressing the question of whether the petitioners in this case were immune from suit for damages brought under section 1983 for the negligent deprivation of a constitutional right.[41]

Burger addressed the issue of negligence by first the issue of whether Navarette's claim was properly dismissed by the court of appeals.[41]

Burger addressed the issue of negligence by first complaining that he did not understand exactly what was alleged by Navarette. Burger was not sure whether the negligence was in the officials' inability to understand the prison mail regulations, or in their confiscating the mail because they were mistaken as to its nature.[42] Nevertheless, Burger concluded that as "neither the language nor the legislative history of 1983 indicated that Congress intended to provide remedies for negligent acts," the section 1983 defendant must "exhibit deliberate indifference to the risk of causing" a constitutional injury to be held liable.[43] Burger did not, however, substantiate this assertion.

Justice Stevens, also writing in dissent, attacked the majority for granting the qualified immunity without carefully considering whether there was common law precedent for extending the immunity, and for failing to establish carefully the scope of the immunity.[44] Stevens saw this practice as a continuation of the trend established in *O'Connor v. Donaldson*,[45] where the Court had also refused to support the extension of a qualified immunity to a mental hospital superintendent through the use of either common law precedent or policy considerations. Stevens felt that by automatically assuming that prison officials had the same immunity as school board members, and by failing to stipulate clearly whether the officials under review had discretionary or ministerial functions,[46] the Court was indicating that the type of job a state employee had was irrelevant to the question of whether he should be accorded a qualified immunity.[47] This, Stevens pointed out, was contrary to the Court's practices in the past.[48]

Assuming that negligence does state a cause of action under section 1983, Stevens examined whether the prison officials acted in good faith. Stevens based his theory upon the broader principles underlying the standards set up in *Scheuer* and *Wood*.[49] To Stevens, the "heart of a good faith defense is the manner in which the defendant has carried out his job."[50] To retain this immunity, the official must "believe he was acting within the sphere of his official responsibility."[51] Stevens' reasoning then followed the route opened by *Scheuer*. By varying the scope of the qualified immunity according to the degree of discretion and responsibilities of the office holder, Stevens allowed for an extension of this immunity to all state officials.[52] However, in the spirit of *Scheuer*, Stevens appears to have insisted that officials with different degrees

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Navarette was foreclosed from asserting such a claim as the claim was dismissed with prejudice in an earlier phase of the case. 434 U.S. at 565 n.12.

[39] 434 U.S. at 563.

[40] *Id.* at 563 n.14.

[41] *Id.* at 567 (Burger, C. J., dissenting). This confusion of issues appeared to Burger as a departure from the Supreme Court Rule 23 (1) (c). This rule stipulates that: "only the questions set forth in the petition or fairly comprised therein will be considered by the Court." Nor did this case, according to Burger, fit into one of the exceptions to this rule. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 297 (4th ed. 1969).

[42] 434 U.S. at 567 (Burger, C. J., dissenting).

[43] *Id.* at 568.

[44] *Id.* at 568–69 (Stevens, J., dissenting).

[45] 422 U.S. 563 (1975).

[46] As will be pointed out in section II, *infra*, the Court appears to have kept the ministerial-discretionary distinction intact.

[47] 434 U.S. at 569 n.3. (Stevens, J., dissenting).

[48] *Id.* at 569.

[49] *Id.* at 570–71.

[50] *Id.* at 570.

[51] *Id.* at 571.

[52] *Id.* at 569.

of discretion be held to different standards for retaining their immunity.[53] Thus, those officials "without policymaking responsibility ... [could] establish their defense by showing that they abided by the institution's regulations or by its long-followed practices."[54] On the other hand, the upper-level official would be expected to know whether his actions, including the regulations he promulgates, violate the constitutional rights of his charges.[55]

As a lower-level official could present a good faith defense and achieve immunity by showing that he abided by the institution's regulations, Stevens' reciprocal proposition was that the immunity could be lost by showing that a lower-level official disregarded those regulations. Consequently, taking Navarette's allegations as true, Stevens determined that if the lower prison officials were found to have negligently disregarded the prison mail regulations, they would not be able to establish that they had acted in good faith.[56] Furthermore, Stevens disregarded the fact that the Court had granted certiorari on the negligence claim only, and Stevens addressed the issue of malice under the second part of the *Wood* standard. Assuming Navarette could prove his allegations, Stevens noted that the confiscation of Navarette's mail as punishment for his legal activities would constitute an intent to "cause a deprivation of constitutional rights, or other injury,"[57] thus defeating a claim of good faith. Moreover, according to Stevens, a jury might find that the officials' "animus toward Navarette ... tainted their handling of his mail" and so caused their negligence.[58]

Stevens continued his inquiry as to whether the defendants exhibited bad faith by declaring that while Navarette's first amendment right to correspond was not "clearly established" in 1971, the right of access to the courts was. Therefore, the prison officials should have known that they were violating this right by interfering with Navarette's mail, as many of the letters were addressed to law students and legal aid groups. Stevens explained that while Navarette could not bring suit under section 1983 for the deprivation of this right, he could still use the violation as indicative of the defendants' lack of good faith.[59] Thus, Stevens believed that the prison officials might in fact have acted in bad faith and concluded that the Court prematurely reached the merits of the affirmative defense.[60]

[53] *Id.* at 571.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 572.
[57] *Id.* (citing 420 U.S. at 322).
[58] 434 U.S. at 572.
[59] *Id.* at 573-74.

II

Given the Court's failure to provide detailed support for its decision to extend a qualified immunity to prison officials, it is necessary to distinguish those characteristics that the official under review must possess to be accorded a qualified immunity and to determine the scope of the immunity. In earlier section 1983 cases, the Court focused on three characteristics, or indicia, in determining whether and to what extent a qualified immunity should be extended. The Court considered the official's need to rely on information gathered from traditional sources within his organization; to assess a variety of options in making complex and subtle decisions; and to make these decisions swiftly. All three of these factors, individually and in combination, are elements in ascertaining the degree of discretion exhibited by the official in his daily decisions.

The Court first used these factors in *Pierson v. Ray*.[61] There, an interracial group of ministers sued a judge and two policemen under section 1983 for false arrest and imprisonment.[62] The Supreme Court held that the judge who convicted the ministers was absolutely immune from suits for damages brought under 1983[63] and the policemen were entitled to a qualified immunity. The Court determined that the Congress did not intend to destroy

[60] *Id.* at 574. Stevens appears to have separated the issue of whether an official has acted in good faith from the issue of whether the defendant can be liable for violating the constitutional right in question. However, in reviewing the Court's previous § 1983 cases, it appears that bad faith must be established by showing that the defendant intended to deprive the plaintiff of the specific constitutional right being sued upon, or by showing that the defendant should have known that his actions violated that particular right. Thus, contrary to Justice Stevens' notion, it appears that in a § 1983 suit, the question of whether or not the defendant acted in good faith so as to retain his immunity, and the question of whether the defendant was liable for actually violating the plaintiff's rights, are one and the same.

[61] 386 U.S. 547 (1967).

[62] The ministers were arrested while trying to enter a "white only" waiting room in an interstate bus terminal situated in Mississippi. They were convicted for refusing to obey a police order to disperse after the police had determined that the ministers' presence was a potential source of violence. After their conviction was reversed on appeal, the minsters brought suit. *Id.* at 549-50.

[63] *Id.* at 553-54.

the common law defenses to false arrest of good faith and probable cause with the passage of section 1983. Without this defense, the Court reasoned that the officer, who must quickly decide whether or not to make an arrest, would be in the position whereby he either neglected his duty where probable cause existed, or made the arrest only to be dragged into court by a subsequently vindicated defendant.[64] Thus, it was the discretion involved in having to decide swiftly whether or not to make an arrest which prompted the Court to accord policemen a qualified immunity.[65]

The Court in *Scheuer v. Rhodes*[66] used a similar rationale in extending a qualified immunity to a governor and his principal subordinates.[67] In *Scheuer*, the personal representatives of the estates of the four students killed at Kent State sued the Governor of Ohio and various other state officials under section 1983 for "intentionally, recklessly, willfully and wantonly" causing an "unnecessary deployment" of the National Guard on the campus which resulted in the deaths.[68] The Court, having *Pierson* as precedent, noted that the decision to employ the guard to quell civil disorder was one that had to be made, "swiftly and firmly," from "virtually infinite" choices, in a time of "confusion and ambiguity."[69] Moreover, as these decisions were based on information supplied by lower-echelon employees the officials were prey to the problems inherent in relying on information gathered by others.[70] The *Scheuer* Court realized that as these decisions were more complex and more subtle than those made by lower-level officials, it was obvious that top-level executive branch officials required an even greater degree of discretion than lower-level officials such as policemen.[71] Thus, the Court constructed the concept of a "varying scope" of immunity. The variation was determined, in part, by the degree of discretion and responsibility exhibited by the official.[72] In varying the scope of the immunity to accord with the degree of discretion exhibited by the higher level official, the Court constructed a subjective standard for determining whether the official retained his immunity. Thus, it was the "existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith,"[73] that formed the basis of this immunity.

By further varying the scope of the immunity, the Court, in *Wood v. Strickland*,[74] was able to extend a qualified immunity to an official exhibiting less discretion. In *Wood*, three students who claimed that their rights to due process of law were violated by their expulsion from public school, had sued the individual school board members under section 1983.[75] In extending a qualified immunity to the school board members, the Court again supported its extension of the immunity and determined its scope, by comparing the duties of the defendant officials with those factors indicating the degree of discretion required by those officials.[76] The Court reasoned that a school board member, having to "judge whether there have been violations of school regulations and if so, the appropriate sanctions for the violations"[77] required some degree of discretion and therefore a qualified immunity of comparable scope.[78] Sensing that the scope of this immunity should be less than that accorded a high level official of the executive branch, the Court stipulated that:

> a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within

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[64] *Id.* at 555.

[65] *Id. Accord,* Scheuer v. Rhodes, 416 U.S. 232 (1974).

[66] 416 U.S. 232 (1974).

[67] *Id.* at 247.

[68] *Id.* at 235.

[69] *Id.* at 246–47.

[70] *Id.* at 246.

[71] *Id.* at 247.

[72] *Id.* The standard set out in *Scheuer* noted that:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity for acts performed in the course of official conduct.

Id. at 247–48.

[73] *Id.* at 247–48.

[74] 420 U.S. 308 (1975).

[75] The students were expelled for violating a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. *Id.* at 310.

[76] The Court noted that school board officials must rely on "traditional sources" for gathering information, and analogized between the executive branch official faced with civil disorder and the school official having to reach a prompt decision upon confronting disruptive student behavior. 420 U.S. at 319.

[77] *Id.*

[78] The Court concluded that a school board member faced with this type of discretionary decision, like policemen and governors, would be deterred from exercising his judgment with independence and decisiveness if he was not granted some type of immunity from monetary suits. 420 U.S. at 320.

his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.[79]

Unlike the more subjective standard set up in *Scheuer*, the *Wood* standard was at once both subjective and objective,[80] as the "standard of conduct [was] based not only on permissible intentions, but also on knowledge of the basic unquestioned constitutional rights of his charges."[81] Thus, either malice or an "ignorance or disregard of settled indisputable law"[82] would serve as bad faith under the standard.[83]

While the Court in *Wood* hinted that it was limiting its extension of this qualified immunity to the "specific context of school discipline,"[84] the extension of this immunity to a mental hospital superintendent in *O'Connor v. Donaldson*,[85] established that the *Wood* standard was applicable to all officials whom the court felt required such protection. Surprisingly, Justice Stewart, writing for the Court, never supported his opinion by citing either common law or policy considerations. Consequently, *O'Connor* has been cited as indicating that the Court, in granting a qualified immunity, will not distinguish between those officials having discretionary functions and those having ministerial duties.[86] This does not appear to be so clear, however, for while the *O'Connor* case was before the court of appeals, that court recognized that mental hospital superintendents do exercise some discretion.[87] Furthermore, it does not appear that Justice White, in *Navarette*, believed that the distinction was dead, as he made sure to note that the officials involved therein were prison officials with discretionary functions.[88]

With this precedent before it the *Navarette* Court was able to justify extending a qualified immunity to prison officials in the manner it did. *Scheuer* and *Wood* indicated that an official's scope of discretion would determine the scope of that official's immunity. *Wood* also established a standard for officials exhibiting a lower degree of discretion than a top ranking executive branch official. *O'Connor* recognized that the Court was determined to extend this immunity to more state officials in the future and indicated that the Court need not spell out what factors were considered in according the immunity as had been done in earlier section 1983 cases. Thus, all that remained in the way of determining who was to be accorded this immunity, were the policy considerations discussed in the Court's earlier section 1983 cases and the stipulation that for an official to be accorded a qualified immunity he must, at the very least, have a discretionary function. As the Court in *Navarette* stipulated that the officials involved had discretionary functions, and as it had assumed that their degree of discretion was similar to that of the school board members in *Wood*, the Court, it seems, believed that those policy considerations discussed in *Pierson*, *Scheuer* and *Wood* continued to support the decision made in the present case. Consequently, the Court might have felt that the mere citing of court of appeals decisions that had already accorded an immunity to such officials, was enough support for its decision.[89]

III

The extension of a qualified immunity to some prison officials seems warranted and logical. How-

[79] 420 U.S. at 322.

[80] The Court noted this in *Wood*, 420 U.S. at 321, and commented: "The disagreement between the court of appeals and the district court over the immunity standard in this case has been put in terms of 'objective' versus 'subjective' test of good faith. As we see it, the appropriate standard necessarily contains elements of both."

[81] 420 U.S. at 322.

[82] *Id.* at 321.

[83] This semi-objective standard basically states that bad faith can be no more than a type of negligence, for under tort law, a person who has exercised his own best judgment may still be negligent if his behavior is outside the norm of ordinary prudence.

[84] 420 U.S. at 322.

[85] 422 U.S. 563 (1975). In *O'Connor*, a former mental patient claiming that he was not dangerous to himself or anyone else, sued the official who would not grant his release for damages under § 1983. The defendant claimed "he was acting pursuant to state law, which he believed authorized [the] confinement" and thus was acting in good faith. The Court remanded the case to the court of appeals to reconsider O'Connor's claim in light of the standard set out in *Wood*.

[86] Bryan v. Jones, 530 F.2d 1210, 1214 (5th Cir. 1976).

[87] Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974). While the defendant in *O'Connor* did not have to make quick decisions of as complex a nature as did the police in *Pierson* or the officials in *Scheuer*, he did have to exhibit some discretion in his job. While before the court of appeals, O'Connor pointed out that superintendents of mental institutions are empowered to release patients when in their own judgement these patients are no longer in need of confinement. The court of appeals did not refute the fact that O'Connor's job entailed elements of discretion but ruled that for an immunity to be accorded, the officer must have a discretionary function and act in good faith.

[88] 434 U.S. at 561 n.7.

[89] One case in particular, Hoit v. Vitek, 497 F.2d 598 (1st Cir. 1974), appears to have considered the character-

ever, Justice White in *Navarette* might have more clearly noted that the officials under review had discretionary functions by pointing this out in the text instead of in a footnote. This was especially true in this case as Justice Stevens, dissenting, indicated that there was some question whether or not one of the officials accorded an immunity had the ministerial function of bagging and delivering prisoner mail.[90] In light of *O'Connor*, White's carelessness adds to the confusion over whether or not officials with ministerial functions are to be accorded a qualified immunity. Moreover, instead of giving only a vague idea of the scope of their discretion with reference to several court of appeals cases that had already accorded prison officials a qualified immunity, an analysis similar to that employed by the Court in *Pierson, Scheuer,* and *Wood*, would have been more appropriate.

The *Navarette* Court, in extending the qualified immunity to prison officials having discretionary functions, could have followed its steps in *Scheuer* more closely by setting up a sliding scale of immunity, varying according to the scope of discretion needed by the particular official. This was the position endorsed by Justice Stevens.[91] This approach would have meant that the Court could not only have distinguished between a prison administrator and a school board member, but that the Court could have also distinguished between the different prison officials involved in this case. For instance, the Director of the State Department of Corrections surely employs a different scope of discretion in carrying out his tasks than does the prison official in charge of handling incoming and outgoing mail.

However, it should be noted that the standard advocated by Justice Stevens does two things. First, it softens the *Wood* standard because ignorance could now be offered as a defense.[92] For instance, a lower-level official could follow regulations and never know that he was in violation of the Constitution. Secondly, while the standard requires a higher degree of knowledge of basic constitutional rights from upper-level officials, as the type of decision to be made becomes more subtle and complex and the circumstances more chaotic, the standard of reasonableness becomes more vague. Hence, as to his knowledge of the "unquestioned" constitutional rights, an upper-level official would be expected to be more knowledgeable than his subordinates, while the parameters establishing whether a lower-level official acted reasonably, are better defined.

The *Navarette* Court's assertion that a constitutional right must be "clearly established" before an official can be expected to know that his action violated that right, is well supported by earlier Supreme Court cases.[93] However, the Court, in placing so much emphasis on the issue of clarity may unnecessarily have invited difficult decisions in the future. The Court in *Wood* seemed to indicate that the phrases, "settled indisputable law" and "unquestioned constitutional rights," were synonymous with the phrase, "clearly established."[94] Justice Powell, dissenting in *Wood*, criticized the majority rule established because it held the school board member to the responsibility of knowing the answers to very normative questions. Requiring a knowledge of "settled indisputable law" and "unquestioned constitutional rights," was, to Powell, not "likely to be self-evident to constitutional law scholars—much less the average school board member."[95] The Court in *Navarette* hints at an even more arduous task, in that the clarity of a right may be evaluated by reference to the opinions of the Supreme Court, the courts of appeals, or the district courts.[96]

Finally, it is hard to understand why the Court granted certiorari on the issue of whether negligence can serve as a cause of action in a section 1983 suit, but never answered the question. In skipping over this question to address the question of immunity, Justice White seems to have assumed that negligence can state a cause of action under

istics of the position of prison warden in according the immunity. For instance, the court stated that; "A prison warden, charged with controlling an unwilling population aided by perhaps an inadequate number of guards, faces the most demanding and delicate decisions as to the nature and extent of the sanctions he should impose and the timing and effect of their removal". *Id.* at 601. Moreover, the court recognized that a warden must often act swiftly to control "impending disturbances which might overtax the control capacity of a prison." *Id.* at 600. Consequently, it is possible that the *Navarette* Court, rather than looking at the factual situation in the case before it, looked at the nature of the job as described by the court of appeals in deciding that prison officials should be accorded a qualified immunity.

[90] 434 U.S. at 569 n.3 (Stevens, J., dissenting).

[91] *See* text accompanying note 54 *supra.*

[92] *See Wood,* 420 U.S. at 321–22. The *Wood* standard expects a knowledge of "basic, unquestioned constitutional rights," and this does not appear to leave room for ignorance at any level.

[93] *See Pierson,* 386 U.S. at 557; *Wood,* 420 U.S. at 322.

[94] 420 U.S. at 321–22.

[95] *Id.* at 329 (Powell, J., dissenting in part).

[96] 434 U.S. at 565.

section 1983. In his analysis of the immunity question, White relied, in part, on the good faith standard established in *Wood*. That standard makes both malice and "ignorance or a disregard of settled indisputable law," an act in bad faith.[97] Ignorance of what one is expected to know is surely a form of negligence. Thus, the court in *Kneely v. Bensinger*[98] interpreted the *Wood* standard as the Supreme Court's way of insuring that "careless disregard or negligent ignorance of clear constitutional rights and duties would not be insulated from liability."[99]

Moreover, Chief Justice Burger's assertion in *Navarette* that Congress did not intend to provide remedies for negligent acts also appears to be incorrect.[100] Upon examination of the language of section 1983, it seems that the statute does not limit the causes of action that may be brought under it. Where the statute talks of "subjecting" or "causing" the deprivation of a constitutional right,[101] the statute does not say how one is subjected or how the defendant is to cause the injury. The statute speaks only of results. Furthermore, in *Monroe v. Pape*,[102] the Court addressed the issue of whether section 1983 acted to remedy the deprivation of a constitutional right caused by a state official's abuse of his position. The Court, in determining the type of action which might be brought under section 1983,[103] juxtaposed the 1983 statute with that of 18 U.S.C. § 242, which was examined in *Screws v. United States*.[104] The *Monroe* Court stated that since section 242 imposed criminal penalties for acts "wilfully" done, this meant that a defendant had to intend specifically to deprive a person of a constitutional right. The Court stated that, "[w]e do not think that gloss should be placed on 1979 [now section 1983] .... The word 'wilfully' does not appear in § 1979. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[105] Consequently, it seems arguable that a plaintiff alleging the deprivation of a "clearly established" constitutional right should be able to bring a negligence claim against a state official under section 1983.

[97] 420 U.S. at 321.
[98] 522 F.2d 720 (7th Cir. 1975).
[99] *Id.* at 725.
[100] 434 U.S. at 567-68 (Burger, C. J., dissenting).
[101] 42 U.S.C. § 1983 (1970).
[102] 365 U.S. 167 (1961).
[103] *Id.* at 170.
[104] 325 U.S. 91 (1945).

Conclusion

With *Navarette*, the Court has continued to extend the good faith qualified immunity to all levels of government officials. However, the Court still appears to distinguish between those officials with ministerial duties and those exercising discretion. It will be interesting to see if Justice Stevens can convince the rest of the Court to return to *Scheuer* and *Wood*, and construct new standards for different officials exercising different degrees of discretion. In so doing, it would be helpful if the Court clearly delineated those factors which determine the scope of an official's discretion, as it did in *Pierson, Scheuer*, and *Wood*.

Faced with a clearly established constitutional right, the Court appears ready to entertain the question of whether negligence can state a cause of action under section 1983. The Court in *Navarette*, while leaving the question unresolved, seemed to hint that negligence could be a cause of action under section 1983 by skipping over that issue to address the claim of immunity. The language of the statute apparently leaves room for such a cause of action and the Court's previous interpretation of section 1983, in *Monroe v. Pape*, acknowledged that intent was not a requisite element in a 1983 suit. Thus, the Court has the tools to decide the question and the apparent inclination to say yes.

Finally, it should be clear from *Navarette*, that for a plaintiff to bring suit against a state official under section 1983, he must make sure that the right alleged to have been violated is "clearly established." Failure to so allege will end a 1983 suit before a court has even entertained evidence as to what the defendant should have known or whether he exhibited any malice. As it is difficult to tell exactly what constitutes clarity in this regard, it should be expected that this issue will be the subject of important future litigation.

[105] 365 U.S. at 187.